In the Supreme Court of the United States.

OCTOBER TERM, 1913.

FRANK F. GRAHAM AND THE TITLE GUARANTY AND SURETY COMPANY, plaintiffs in error,
v.
THE UNITED STATES.
No. 76.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

This action was brought in the Circuit Court of the United States for the District of Maryland by the United States against the contractor, Graham, and his surety, the Title Guaranty & Surety Company, to recover damages accruing from the breach of a contract "to transport from the quarry, cut, box and deliver complete, all of the Bethel granite, to be furnished by the party of the first part free on board cars at the quarry

at Bethel, Vermont, required for that portion of the South pavilion above the first floor level of the said building for the National Museum, in Washington, District of Columbia, described as part 'C' in the said specifications, and do all other things needful to carry out all and singular the several requirements of the said specifications, the drawings therein referred to, and the instructions and general conditions " (R. 1–2, 57).

The contractor filed 14 pleas (R. 6–16) and the surety 15 (R. 17–28). Of these latter the first 14 were similar to those filed by the contractor, and the 15th charged material alterations of the contract without the assent of the surety.

The trial lasted some 20 days, at the end of which time the jury found a verdict for the plaintiff for the penalty of the bond, to wit, $50,000. The defendants took 39 separate bills of exception (R. 874), submitted 26 special prayers for instructions (R. 855, 866) and as plaintiffs in error in this court present 48 assignments of error (R. 938–971). The record apparently contains everything which happened during the course of a hotly contested jury trial. The Circuit Court of Appeals for the Fourth Circuit affirmed the judgment in all respects (R. 929; 188 Fed. 651), and it may well be asked how far counsel or this court should now be required to consider those assignments of error which do not raise clear, substantial questions of law but merely represent dissatisfaction

with the rulings of the trial judge from which no prejudice to the plaintiffs could have ensued.

A reading of the record will disclose—

First, that the breach and abandonment of the contract by the contractor Graham was deliberate and without excuse.

Second, that the action taken on behalf of the Government after such breach was in strict accordance with the terms of the contract and the rights of the parties.

Third, that there are no peculiar defenses available to the surety.

Fourth, that in the conduct of the trial no errors were committed which were prejudicial to the plaintiffs in error or either of them.

The multitudinous assignments of error may be most conveniently classified and disposed of with reference to these four propositions.

ARGUMENT.

I.

The breach and abandonment of the contract by the contractor Graham was deliberate and without excuse.

The evidence shows (R. 113, 116, 431, 432, 802, 803) that on the 7th day of March, 1908, without previous warning, Graham paid off and discharged his workmen, closed his yard, and abandoned his work on the contract. When information of this fact reached Bernard R. Green, Superintendent of Construction, on the part of the Gov-

ernment, he wrote under date of March 11, 1908 (R. 113), expressing his surprise and received in reply from the attorney for Mr. Graham a letter dated March 14, 1908, stating (R. 116) that his "client had stopped work" on the contract, and that this act was "necessary for his financial welfare in view of the fact of the damage he has sustained, which said damage was not occasioned by any fault or neglect on his part, by reason of the manner in which this matter has been gone on with on the part of the Government, and their agents in the matter."

Graham then bestirred himself to invent excuses, and has presented in the courts below and in this court the following:

(1) An alleged delay on the part of the Government in furnishing the granite.

(2) An alleged failure on the part of the Government to furnish "net dimension blocks" as required by the contract (R. 41, par. 5).

(3) An alleged failure on the part of the Government to make payment as required by the contract.

(1) The alleged delay on the part of the Government in furnishing the granite.

The contract provided (R. 41, 57, 58) that—

> The necessary Bethel granite stock, in net dimension blocks, is to be furnished to the Government by the present contractor, free on board cars at the quarry in Bethel, ready

> for the contractor for the cutting of the granite to transport it to his cutting yards for that purpose * * *.
>
> The party of the second part shall transport from the quarry, cut, box and deliver complete, all of the Bethel granite, to be furnished by the party of the first part free on board cars at the quarry at Bethel, Vermont, * * *.

There was evidence tending to show that at the outset there was delay in getting granite to the contractor. It was the duty of the contractor to furnish setting plans for the guidance of the quarrymen in taking out the stone, and it is contended on the part of the Government that the contractor was unduly slow in furnishing these plans, and on the part of the contractor that the Government was not prompt in approving them. But however this may be, it is undisputed (R. 580, 581, 843, 844) that from February, 1907, on, there was always more stone at the quarry ready to be loaded than there were cars to receive it, and that the cause of the delay was a shortage of car supply (R. 843, 844). This condition of affairs it was not within the power of the United States to remedy; nor was it its duty to do so.

The obligation of the United States was merely to furnish the granite "without unnecessary delay, and without charge, *free on board cars* at the quarry at Bethel, Vermont." These words of the contract, in the absence of any agreement to the

contrary, imposed upon Graham alone the duty of furnishing the cars.

62 L. R. A., 795, 797; note.
Hocking v. *Hamilton,* 158 Pa. St. 107.
Baltimore etc. Co. v. *Steel Rail etc. Co.,* 123 Fed. 655.
Evanston etc. Co. v. *Castner,* 133 Fed. 409.
Sutherland v. *Allhusen,* 14 Law Times Rep. (N. S.) 666.

This is according to common sense, since the contractor, having to pay the freight, was primarily interested in the route by which the stone should be shipped and likewise in the times and quantities of the shipments.

In the present case, so far from there being any agreement contrary to the general rule, it appears (R. 645) that on February 20, 1907, the Superintendent of Construction wrote to Graham to the effect that it was his duty to attend to the supply of cars, and, so far as the record shows, Graham never dissented from that view.

These same considerations dispose of the claim that later on shipments were unduly rushed, since this matter also it was Graham's duty to regulate.

However, the trial judge did not charge the jury that there was an absolute duty on Graham to furnish cars, but that "if the government, by its agents, made all reasonable efforts to see that cars were furnished," then Graham was not justified in abandoning the contract (R. 869). This charge, it is submitted, was even more than the defendants

could ask, and the jury by its verdict must have found that the Government did make such reasonable efforts.

Still further, assuming, for argument's sake, that delay on the part of the Government in furnishing the stone would constitute a breach of a dependent covenant which would entitle Graham to refuse further performance, it is undisputed that, with a full knowledge of such delay, he continued his work on the contract without any attempt to rescind, and on February 10, 1908 (R. 346, 347), he wrote a letter to the Superintendent declaring his intention to devote his entire yard to the Museum work until he saw the job about completed. Such action, as the Court of Appeals held, clearly constituted a waiver of any right to rescind.

(2) The alleged failure on the part of the Government to furnish "net dimension blocks," as required by the contract (R. 41, par. 5).

A great deal of evidence was submitted to the jury as to the meaning of this term, and some differences developed on the subject between the witnesses for the plaintiff and those for the defendants. The defendant Graham worked himself up to the point of stating (R. 790):

> In net dimension it is perfect. It is either a sawed block or a cut block. Everybody knows what a net dimension block is; it is either cut or sawed.

This in the face of the contract which called for the delivery of "net dimension blocks" to be *cut* by him.

He stood alone in this definition and nothing was further from his own mind when the contract was signed. After stating that he was satisfied if the stone was an inch or two, or even three inches, over (R. 810), and after writing to Green in February, 1907, that "as a rule rough stone never runs more than an average of 225 lbs. to the foot" (R. 818), he expounds the reason for his change of front in this language (R. 819):

> I said, these are going to be the best patterns that have ever come into Baltimore when I saw that in there; but *since* I found out that a net dimension block means a *perfect* block and I am trying to hold you *now* to that specification. [Italics ours.]

The question was preeminently one for the jury and was submitted to it by the court in the following language of the general charge (R. 869):

> Now, it is for you to say whether on a fair average the rough stone furnished complied with the stipulation that it should be furnished in net dimension blocks, as you find the meaning and intention of that stipulalation was understood by the parties to the contract.

This last remark of the trial judge was based on the general conduct of the contractor in accepting as net dimension blocks the stone sent to him and

using it in carrying out the contract, and also on his specific testimony (R. 810, 818–820) as to his own understanding in the matter.

While the trial judge very properly called the jury's attention to certain specific evidence which seemed to him to have an important bearing on the question (R. 869), he nevertheless stated this evidence with entire accuracy and left the whole question to the jury. In this respect the charge is not open to objection. *Rucker* v. *Wheeler,* 127 U. S. 85, 93.

It is suggested that the ordinary rule of reading an ambiguous contract in the light of the interpretation placed upon it by the parties themselves, does not prevail in this action because one of the defendants is a surety and the action is on the bond. No authority is cited for this somewhat novel doctrine. Since the bond is given to insure a faithful performance of the contract, no reason is perceived why the ordinary rules for the interpretation of the contract may not be used to fix in turn the obligation of the bond.

(3) The alleged failure on the part of the Government to make payment as required by the contract.

When asked whether he had not abandoned the contract because of mistake on his part in estimating the amount of stone to be cut, Graham answered: " No, sir; I did not. I stopped because I could not get any money " (R. 810).

This is quite as flimsy as the other excuses put forward. On March 6, 1908, the day before his abandonment, he was paid $2,700, making $59,400 paid to that time (R. 120, 153, 635). These payments, made to Graham, were based upon an estimated allowance of $2.50 per cubic foot, and had they been continued at the same rate throughout the life of the contract Graham would have been largely overpaid (R. 658). Neither as to quantity or time of payment does the record disclose the slightest ground for complaint on his part. (See Record, p. 53, par. 41, for contract provisions with reference to payment.)

II.

The action taken on behalf of the Government after the breach of the contract was in strict accordance with the terms of the contract and the rights of the parties.

(1) The declaration of annulment.

The contract (R. 57, 58, par. 4) provided that "if the contractor should in the judgment of the Superintendent of Construction fail to prosecute the work diligently the Superintendent should have the power, *with the sanction of the Regents of the Smithsonian Institution,* to annul the contract."

Graham, as we have said, entirely abandoned the work on March 7, 1908, and by his counsel so notified the Superintendent of Construction on March 14. Thereupon, on March 18, 1908, the Superintendent of Construction wrote a letter to the Secre-

tary of the Smithsonian Institution (R. 75) recommending an annulment of the contract, and on the same date the Secretary wrote authorizing the annulment (R. 77), which fact was duly communicated to the contractor and his surety (R. 76).

It is now insisted by the plaintiffs in error that the sanction of the Regents of the Smithsonian Institution to this annulment was never procured, and that therefore the attempted annulment is inoperative. The answer to this suggestion is obvious.

(a) *No formal annulment was necessary.* When Graham wholly abandoned the contract, as it is clear he did, the United States immediately acquired the right to treat the breach as absolute and to hold him without more saying for any damages accruing to it, the measure of such damages being the increased cost of completing the work. The term "annulment" in such a contract means to refuse to proceed further with the contractor. *United States* v. *O'Brien,* 220 U. S. 321, 328. And, of course, the United States could not proceed further if the contractor himself refused to go on. The notice of annulment, as said by this court in *United States* v. *McMullen* 222 U. S. 460, 471, "was merely a ceremony to mark the point of default as a preliminary to employing some one else." Since, therefore, the annulment was a mere formality, it is wholly immaterial whether the Regents sanctioned it or not.

(b) *But the evidence in the record clearly shows that the Secretary was the agent of the Regents in such matters as the approval and annulment of contracts, and the sanction given by him was pro hac vice the sanction of the Regents.*

The Smithsonian Institution is a corporation (R. S., 5579), of which the Regents, consisting of the Vice President of the United States, the Chief Justice of the United States, certain members of the Senate and House and others, are virtually directors (R. S., 5580).

The Secretary has charge of the buildings and property of the Institution and keeps the records of the Board (R. S., 5583) and its accounts (Act Oct. 2, 1888, 25 Stat. 505, 529). Moreover, by long usage the Secretary is actually the director of the Institution (R. 79). Apparently he is referred to as such in acts of Congress (Act July 7, 1884, 23 Stat. 194, 214); and by resolution of the Board (R. 80) and by custom and practice (R. 83), approves of contracts and other matters relating to the construction of buildings. Moreover, the plans for the very building now in question were to be approved by him (Act June 28, 1902, c. 1301, 32 Stat. 419, 440).

An agency may be proved by acts *in pais* as well as by proof of direct authority.

Bank of United States v. *Dandridge*, 12 Wheat. 64, 70, 83.

Bronson's Exr. v. *Chappel*, 12 Wall. 681.

Mining Co. v. *Anglo-Californian Bank,* 104 U. S. 192.

It is not to be supposed that Congress intended the Regents of the Institution, burdened as they are with public duties of surpassing moment, to charge themselves with such details as the approval or annulment of individual contracts for builders supplies.

(c) *The clause in the contract calling for the sanction of the Regents upon its annulment is itself void.*

The Act of Congress of March 3, 1903, 32 Stat. 1083, 1102, conferred upon Bernard R. Green alone the right to make the contracts for the construction of this building. As it would be beyond him to increase the powers conferred upon him by this act, it is equally so, we submit, to lessen them by sharing any portion of these powers with another. Of the limitations which bound him in this respect plaintiffs in error had full notice. *Whiteside* v. *United States,* 93 U. S. 247, 256.

III.

There are no peculiar defenses available to the surety.

Two such special defenses are suggested; first, extension by the Superintendent of the time for completion, and, second, material alterations made by the Superintendent and contractor without the knowledge of the surety. These are equally unsubstantial.

(1) Extension of time.

The contract was to be completed October 1, 1907 (R. 42). It is objected by the surety (R. 26, 27, 314) that this time limit was waived without its assent. Paragraph 5 of the contract provided (R. 59) that the Government instead of annulling the contract for failure to complete within the time stipulated might "waive the time limit and permit the party of the second part to finish the work within a reasonable period, to be determined by the said party of the first part." This part of the contract was of course assented to by the surety, and the case therefore is governed completely by *United States* v. *McMullen, supra;* and this applies equally to the argument that the waiver was not by formal agreement.

(2) Material alterations.

The contract by paragraph 6 (R. 59, 60) provided that if changes in the project should be found advantageous such changes

> * * * must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Regents of the Smithsonian Institution: *Provided,* That no payments shall be made unless such supplemental or modified agree-

ment was signed and approved before the obligation arising from such modification was incurred.

Certain extra work was found advantageous, and on February 20, 1908 (R. 236, 237), Graham wrote to the Superintendent enclosing a detailed bill of these extras. On February 29 the Superintendent answered the letter (R. 240), stating that the amount claimed was too large according to the Government's figures, and offering to adjust the matter by the payment of $4,000, which amount was accepted by Graham (R. 241), and allowed him on account. The Surety Company now contends that this was a material alteration of the contract which released it from its obligation on the bond. But the difficulty with its claim is this: Either these alterations were agreed upon in the manner provided in paragraph 6 of the contract, or they were not. If they were, then the surety, having assented to such alterations in advance, can not object. *United States* v. *McMullen, supra.* If they were not, then no valid agreement for alterations was ever made at all, no claim ever existed in favor of Graham against the United States on account of them (see par. 7 of the contract, R. 60), and the allowance of $4,000 to Graham was a mere gift by the Government, of which the surety can not complain.

Moreover, no damage whatever accrued to the Surety Company by reason of Graham's doing this extra work, and being paid for it. If a formal

agreement had been entered into for the extras, the surety could not have objected, and evidently the provision as to a formal agreement was inserted for the benefit of the United States, and the lack of such an agreement where the work is actually done and paid for could not prejudice the surety. The rule *strictissimi juris* should not be applied to these professional bonding companies to release them from their just obligations where slight changes have been made in the contract, not injuring them in the least.

> *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416, 426.
>
> *Hill* v. *American Surety Co.*, 200 U. S. 197, 202.
>
> *Atlantic Trust etc. Co.* v. *Laurinburg*, 163 Fed. 690, 695, 696.

In the latter case the Court of Appeals for the Fourth Circuit said:

> The very reason for the existence of this kind of corporations, and the strongest argument put forward by them for patronage, is that the embarrassment and hardship growing out of individual suretyship that give application for this rule is by them taken away; that it is their business to take risks and expect losses. If, with their superior means and facilities, they are to be permitted to take the risks, but avoid the losses, by the rule of strictissimi juris, we may expect the courts to be constantly engaged in hearing their technical objections to contracts pre-

pared by themselves. It is right, therefore, to say to them that they must show injury done to them before they can ask to be relieved from contracts which they clamor to execute. * * *

IV.

In the conduct of the trial no errors were committed which were prejudicial to plaintiffs in error or either of them.

Many of the assignments of error, which have to do with the conduct of the trial, the admission or exclusion of evidence, and the charge of the court to the jury, are so plainly captious that they need no discussion. The following may be noticed:

(1) The letter-heads of the Surety Company were properly admitted, and counsel's comment upon them was not prejudicial error.

This plaintiffs in error are pleased to call the "million dollar argument." The Government, in order to show knowledge on the part of the Surety Company of Graham's default, and that the Company in the face of such knowledge made none of the objections to the Government's claim which are now urged, offered in evidence certain letters passing between the Superintendent of Construction and the company's attorney (R. 125, 131). The letters of the latter were written on letter-heads of the company, which stated, *inter alia*, that its capital and surplus was $1,000,000. The United States Attorney in his address to the jury, after reading

this statement, remarked (R. 875): "There is no room for sympathy for the poor defendant in this case."

It is now claimed that the letter-head should not have been admitted and that the remarks of the United States Attorney were of such an unfair character as to form the just basis of an assignment of error in this court. Upon the first point it suffices to say that the letters themselves were admittedly competent and therefore the letter-heads, being a part of the letters, were also competent; or, to quote the language of the Court of Appeals on this subject (188 Fed. 654):

> * * * Nor can we quite see what line can be firmly drawn against the introduction of a letter headed communication which letter head has been promulgated, published, and used by the surety company for no other purpose that we can conceive of than that of furnishing a brief, accurate description of itself, its address, its responsible officers, the nature of its business and its financial ability to conduct such business, and it is far from clear to us how such defendant could be prejudiced by this its own act, especially before a jury charged, as in this case, by the court that:
>
> "The same principles of right and justice which prevail between individuals should control the construction and carrying out of contracts between the government and those who contract with it or its agents."

As to the remarks of the United States Attorney, it may be observed that the statements of opposing counsel to which they were undoubtedly an answer, are not in the record, and it does not appear whether or not Graham's insolvency had been held up to the jury to arouse its sympathy. But in the face of the case made upon the record it requires a fertile imagination to conceive that these remarks influenced the jury in the slightest. The matter was one clearly within the discretion of the trial judge and is covered by the remarks quoted above from his general charge, which were preceded by his further statement (R. 868) that "it is not a case for sentimental considerations of any kind."

(2) The measure of damages.

Some point is made by the plaintiffs in error as to the granting of defendant in error's prayer on this subject (R. 904; brief p. 76), but the objection is unsubstantial in the extreme. It is submitted that the prayer fairly conforms to the language of this court in *United States* v. *McMullen*, supra, saying that:

> * * * The cost to the United States was the least for which it could get the work done under the conditions upon which the Government was bound to contract, and must be assumed to have been reasonable in the absence of any evidence to the contrary.

In the case at bar there was abundant evidence of the exact cost to the Government, and no evidence at all contradicting it.

(3) The special charges asked by plaintiffs in error were properly refused.

The plaintiffs in error submitted to the trial judge twenty-six special prayers for instructions (R. 855–866), all of which were refused. As said by the Circuit Court of Appeals (188 Fed. 654):

> * * * The very number of these was calculated to confuse and mislead the jury, and a number were not at all warranted by the evidence. The court, we think, very wisely, concluded to give a general charge touching the matters in controversy, and, so far as we can see, fairly and impartially submitted to the jury the determination of the facts in dispute.

It is settled that a Federal judge is not obliged to give such special charges, but may present the matter to the jury in his own way, provided he state the law correctly. *Continental Improvement Co. v. Stead*, 95 U. S. 161, 166. The objections of plaintiffs in error to the general charge are set out in the record, pp. 870–874. In the main they consist of the points already discussed herein, namely, the annulment of the contract, the duty of the Government to furnish cars, and the meaning of the term "net dimension blocks." The court took from the jury the question of delay on the part of the Government in furnishing the stone, both because there was no evidence upon the subject, the delay being admittedly due to a lack of cars, and also because

Graham had waived his right to complain, if any he had, by continuing work on the contract long after stone had begun to arrive in sufficient quantities. The Circuit Court of Appeals correctly describes the general charge (R. 867) as fair and impartial.

CONCLUSION.

In *Deming* v. *Carlisle Packing Company*, 226 U. S. 102, 106, this court said:

> * * * That the substantial and frivolous character of the only Federal question relied upon of necessity embraces the conclusion that the writ was prosecuted for delay is in our opinion indubitable.

It is respectfully submitted that in the case at bar the inordinate length of the record, the frivolity of most of the matters assigned as error, *e. g.*, the passing remarks of the judge at the trial, the reference in the charge to certain pleas by number rather than by topic, the attack made upon the good faith of the Superintendent in declaring the contract at an end—and the lack of merit in all—must lead the mind to the same conclusion. It is impossible to read the record and the brief of plaintiffs in error without being convinced that while the effort is to raise all possible points in the dim hope that one perchance may prove a plank in the shipwreck, yet the cardinal purpose of the prosecution of this writ of error is delay.

The judgment below should be affirmed, wi
damages at 10 per cent. in accordance with the pr
visions of rule 23, paragraph 2, of this court.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1913.

GRAHAM AND THE TITLE GUARANTY AND SURETY COMPANY *v.* UNITED STATES OF AMERICA.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 76. Argued November 13, 14, 1913.—Decided December 8, 1913.

Where the contractor refuses to go on with the work there is no question of revision of judgment of an officer annulling the contract, and a right of action accrues to the Government without need of any useless ceremony of approval by the superior officer or board. *United States* v. *McMullen*, 222 U. S. 460, distinguished.

In this case, as the bond in terms contemplated an extension of time and the contract provided for modifications, the surety was not discharged by waiver of time limit or for modifications without its express consent.

Under a contract that the Government would furnish the contractor with granite blocks free on board cars at the quarry, he to transport them, *held* that the contractor was to furnish the cars and was responsible for delay in that respect.

In Federal courts the judge and jury are assumed to be competent to play their respective parts; and *held* that the charge to the jury in this case as to the meaning of the phrase "net dimension blocks" was adequate and fair.

This court will not upset a verdict upon the speculation that the jury did not do their duty and follow the instructions of the court; the fact that the attention of the jury was called by counsel for the Government to the statement on the letter-head of the surety company defendant that its capital was $1,000,000, *held* not to have been prejudicial.

An instruction that the Government was entitled to recover, in case of breach found, an amount, not exceeding the penalty of the bond, equal to the difference between the reasonable and necessary cost to it for transporting, cutting and delivering the granite mentioned in the case and the amount specified in the contract, *held* to have referred simply to the granite actually in controversy; and there

being evidence in the case to warrant the finding, and as the measure followed the contract, a verdict for the amount was correct.
188 Fed. Rep. 651; 110 C. C. A. 465, affirmed.

THE facts, which involve the validity of a judgment obtained by the United States against a contractor and surety for failure to perform, are stated in the opinion.

Mr. Charles F. Harley and *Mr. George R. Gaither*, with whom *Mr. John B. A. Wheltle* and *Mr. Burdette B. Webster* were on the brief, for plaintiffs in error.

The Solicitor General for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action upon a bond against a contractor and his surety, for breach of a contract made under the act of March 3, 1903, c. 1007, 32 Stat. 1083, 1102, with Green, Superintendent of Construction, acting under the direction of the Regents of the Smithsonian Institution for the United States, party of the first part, which the bond was given to secure. The contractor, Graham, agreed to "transport from the quarry, cut, box and deliver complete, all of the Bethel granite, to be furnished by the party of the first part free on board cars at the quarry at Bethel, Vermont, required for" a part of the National Museum in Washington described in the specifications, "and to do all other things needful to carry out all and singular the several requirements of the said specifications, the drawings therein referred to, and the instructions and general conditions," for a gross sum. In case of failure to prosecute the work diligently in the judgment of the Superintendent of Construction, Green or his successor was given power, 'with the sanction of the Regents of the Smithsonian Institution, to annul' the contract by notice in

writing, whereupon payments under the contract were to cease, &c., and the United States was given the right to recover from Graham any excess over the contract price expended for completing the contract, which it was authorized to proceed to do. There were provisions for an extension of time by the Superintendent, for written modifications of the contract as to the character or quantity of the labor or material, and for payment of ninety per cent. as the progress of the work might warrant. The bond was for the performance of the contract according to its true intent and during any period of extension granted by the United States.

On March 7, 1908, after the time fixed for the completion of the work, Graham discharged his workmen and stopped work, the contract not having been performed. On March 11, the Superintendent wrote to him saying that he had heard that Graham apparently had stopped work indefinitely, and asking for immediate correct information. On the 14th Graham's lawyer answered that Graham had stopped work; that the step was necessary for his financial welfare in view of the damage that he had sustained through the Government's conduct, and that "if this matter can be in any way amicably adjusted" he would be glad to do anything fair. On the 16th the Superintendent replied that if he received no immediate assurance that the work was to be resumed promptly he must proceed to annul the contract; and on the 18th notified Graham that the contract was annulled with the sanction of the Regents of the Smithsonian Institution. To this Graham's lawyer rejoined that they could not concede any default, that the Government alone was to blame, but that they were willing to do what was fair, and to let the Government use their plant if the damage sustained could be adjusted. The Superintendent had written on the 18th to the Secretary of the Board of Regents recommending the so-called annulment and notice

to the contractor and his surety, and had received his approval expressed to be on behalf of the Board of Regents. Afterwards the United States completed the work. There was a long trial which resulted in a verdict and judgment for the plaintiff for the penalty of the bond, $50,000, subject to exceptions. The judgment was affirmed by the Circuit Court of Appeals. 188 Fed. Rep. 651; 110 C. C. A. 465.

Before considering the excuses alleged by Graham we will dispose of a preliminary objection that the suit cannot be maintained because the Secretary of the Board of Regents did not consult the Board before undertaking to sanction the 'annulment' of the contract. It is unnecessary to pass upon the argument that under the statute the Board could have no voice, and that by custom and practice, as well as by necessity in view of the constitution of the Board, the Secretary represented it in matters like this. The provision as to annulment, construed in *United States* v. *McMullen*, 222 U. S. 460, 471 and cases cited, referred to cases where there was a failure to prosecute the work diligently in the judgment of the Secretary and allowed a revision of that judgment in cases of that sort, before the United States should decline to proceed further and complete the work by other means. But when Graham refused to go on, there was no question of judgment to be revised but a plain breach of the contract unless the refusal was justified, and a right of action accrued without the need of a ceremony that would have had no meaning or use. The letters from March 7 to March 18, 1908, appear to us to show a clear refusal by Graham to do any further work. The expressions as to adjustment suggest nothing but a compromise of mutual claims, to be followed by the Government's, not Graham's, use of Graham's plant.

Another objection not going to the merits of Graham's case is that the surety was discharged by a waiver of the